

CHARLES ANDERSON	*	IN THE
Petitioner	*	CIRCUIT COURT
V.	*	FOR
HARFORD COUNTY COUNCIL	*	HARFORD COUNTY
Respondent	*	Case No.: 12-C-99-000346
	*	

* * * * *

MEMORANDUM OPINION AND ORDER

On April 25, 2000, Charles Anderson (hereinafter referred to as "the Petitioner") was before the Court on a Petition for Judicial Review of the decision of the County Council sitting as the Board of Zoning Appeals for Harford County (hereinafter referred to as "the Board")¹. The Petitioner filed this appeal from the Board decision which denied the Petitioner's request to rezone his property from R1 to B3. The issue on appeal is whether the Board's findings of fact and conclusions of law were supported by substantial evidence.

FACTUAL AND PROCEDURAL BACKGROUND

On March 10, 1998, the Petitioner filed a Zoning Reclassification Application with the County. The Petitioner requested a zoning reclassification of his 2.24 acre lot located at 1209 Old Mountain Road from R1 to B3. The Petitioner alleged in support of his request: 1) that there was a mistake as to the existing R1 zoning; and 2) that there was a change in the character of the neighborhood since the last comprehensive rezoning. The Petitioner alleged that the current R1 zoning was not consistent with the Master Plan as shown on the 1996 Land Use Plan identifying the property as industrial/employment. The Petitioner further alleged that major highway improvements to Route 152 as well as other neighborhood changes severely impacted the residential character of the property. The Petitioner also supported his request with six previous zoning reclassifications in the neighborhood from R1 to B3 and one rezoning in the neighborhood

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¹For the purposes of this opinion, the Court will refer to the "Board" and the "Hearing Examiner" interchangeably because the Board adopted the written findings of fact and conclusions of law of the Hearing Examiner without a written opinion.

from B1 to B3.

A hearing was held before the Hearing Examiner on May 18, 1998. On July 28, 1998, the Hearing Examiner issued his decision recommending that the Petitioner's request to rezone his property from R-1 to B-3 be denied. A request for final argument before the County Council sitting as the Board of Appeals was filed by the Petitioner on August 14, 1998. A hearing was held before the Board on December 15, 1998. On January 12, 1999, the Board adopted the Hearing Examiner's recommendation to deny the requested zoning reclassification. The Petitioner filed a Petition for Judicial Review in this Court on February 10, 1999. Oral arguments were heard by this Court on April 25, 2000. This Court has also reviewed the entire record before the Hearing Examiner and the Board.

STANDARD OF REVIEW

The Court's standard of review of an administrative agency decision is limited. In the absence of a statutory standard of judicial review of an administrative agency decision, the standard is that set forth in Dickinson-Tidewater, Inc. v. Supervisor of Assessments, 273 Md. 245, 329 A.2d 18 (1974). See Bucktail, LLC v. County Council of Talbot County, 352 Md. 530, 549-50, 723 A.2d 440 (1999). "It is clear in Maryland that even 'where [a] statute or ordinance makes no provision for judicial review, an implied limitation upon an administrative board's authority is that its decisions be supported by facts and that they be not arbitrary, capricious or unreasonable.'" Quoting Dickinson-Tidewater, Inc., 273 Md. at 255, 329 A.2d at 25. (citations omitted). Furthermore, the Court of Appeals held in Anderson v. Dep't of Pub. Safety, 330 Md. 187, 211-12, 623 A.2d 198 (1993), that "[t]he common denominator of the scope of judicial review with respect to all administrative agencies . . . is the substantiality of the evidence." See Baltimore Lutheran High Sch. v. Employment Sec. Admin., 302 Md. 649, 661, 490 A.2d 701 (1985). To paraphrase the court, the standard is whether or not a "reasonable mind" would accept the conclusion reached by the A.L.J. See Bullock v. Pelham Woods Apartments, 283 Md. 505 at 512, 390 A.2d 1119 (1978). The court further noted that the circuit court should not substitute "its judgment for the *expertise* of those persons who constitute the administrative agency from which the appeal is

taken." See id.

The circuit court may overturn the ruling of an administrative agency if the court determines that the agency acted arbitrarily, illegally, or capriciously. See Mortimer v. Howard Research, 83 Md. App. 432, 441, 575 A.2d 750 (1990). The determination of whether an agency acted arbitrarily, illegally, or capriciously turns on the issue of whether the "question before the agency was fairly debatable." See id. This standard of judicial review requires an administrative agency to make findings of fact in order for a reviewing court to determine whether the agency's action was fairly debatable. See Bucktail, 352 Md. at 553 (1999). The Court of Special Appeals defined an issue as being fairly debatable if "reasonable persons could have reached a different conclusion on the evidence" See Mortimer, 83 Md. App. at 441, 575 A.2d 750 (1990). (citations omitted). If a different conclusion may have been reached by a reasonable person, "a reviewing court may not substitute its judgment for that of an administrative agency" See id. (citations omitted).

DISCUSSION

As a preliminary matter, the Respondent contends that the Petitioner's Application was premature and not properly before the Board. The Respondent correctly points out that the Harford County Code prohibits filing for a zoning reclassification based upon a change in the character of the neighborhood for a period of one year after the adoption of the Comprehensive Zoning Maps.² See Harford County Code § 267-13(E)(3). On October 1, 1997, the Harford County Council passed a bill adopting the recommended changes and amendments to the zoning maps. Because the Petitioner filed his Application on March 10, 1998, within the one year period, the Respondent alleges that the Application was premature and should be dismissed. However, in November 1997, Harford County citizens were successful in petitioning the bill to referendum thereby delaying implementation of the bill and the changes

² "No zoning reclassification of property shall, for a period of one year after the adoption, by Bill, of the Comprehensive Zoning Maps applicable thereof, be granted by the County Council, sitting as the Board of Appeals, on the ground that the character of the neighborhood has changed." Quoting § 267-13(e)(3).

to the zoning maps until November, 1998. This Court agrees with the Hearing Examiner's analysis that the bill had not been adopted and therefore could not be used as a basis to bar the Petitioner's Application for zoning reclassification.

Additionally, the Court will not address the Petitioner's argument that there was a mistake in the Comprehensive Rezoning of 1989 because the Petitioner's argument that there was a change in the character of the neighborhood is dispositive of this appeal.

This Court is mindful that its role is not to substitute its judgment for the expertise of the Board. This Court's role is limited to determining whether the Board's decision to deny the requested zoning reclassification was fairly debatable. Specifically, in reviewing an agency order, this Court must undertake a three step analysis: 1) whether the agency applied the correct principles of law; 2) whether the agency's factual findings were supported by substantial evidence; and 3) whether a reasonable person could have reached the same conclusion as the agency consistent with its application of the controlling legal principles. See Umerley v. People's Counsel for Baltimore County, 108 Md. App. 497, 503-04 (1996) (citing Comptroller v. World Book Childcraft, 67 Md. App. 424, 508 A.2d 148 (1986)).

1. Whether the Board applied the correct principles of law

In the case sub judice, the Hearing Examiner applied the correct principles of law. The Hearing Examiner correctly pointed out that a zoning classification assigned to a piece of land is presumed to be correct and that the presumption can only be overcome by strong evidence of a mistake in the comprehensive zoning or that there has been a change in the character of the property since the last comprehensive zoning. Rezoning is permissible once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established. The Court of Appeals stated that

[i]t is now firmly established that there is a strong presumption of the correctness of original zoning and of comprehensive rezoning, and that to sustain a piecemeal change therefrom there must be produced strong evidence of mistake in the original zoning or comprehensive rezoning or else evidence of substantial change in the character of the neighborhood. Minor v. Shifflett, 252 Md. 158, 249 A.2d 159 (1969), and the cases therein cited; Randolph Hills, Inc. v. Whitley, 249 Md. 78, 238 A.2d 257 (1968); Woodlawn Area Citizens Ass'n v. Board, 241 Md. 187, 216

A.2d 149 (1966). And, of course, the burden of proof facing one seeking a zoning reclassification is quite onerous. Agneslane, Inc. v. Lucas, 247 Md. 612, 618, 233 A.2d 757 (1967), and the cases therein cited.

Wells v. Pierpont, 253 Md. 554, 557, 253 A.2d 749 (1969).

The Hearing Examiner also enunciated the applicable test Maryland Courts have adopted to determine whether rezoning is appropriate. In order to successfully persuade an agency that rezoning is appropriate, the Petitioner must establish: 1) what area reasonably constitutes the "neighborhood" of the subject property; and 2) that changes in the neighborhood since the last comprehensive rezoning resulted in a change in the character of the neighborhood. See Montgomery v. Board of County Commissioners for Prince George's County, 256 Md. 597, 602, 261 A.2d 447 (1970).

2. Whether the Board's decision was supported by substantial evidence such that a reasonable mind could have reached the same conclusion

a. What area reasonably constitutes the neighborhood of the subject property?

Pursuant to the aforementioned discussion, the Hearing Examiner did apply the correct principles of law. However, it is the opinion of this Court that the Hearing Examiner's determination of what area constitutes the neighborhood was not supported by substantial evidence. In fact, the Hearing Examiner adopted boundaries for the neighborhood in contrast to that described by two experts and the Petitioner.

The subject property is a corner lot with eight hundred feet of road frontage on Route 152 and additional frontage on Old Mountain Road. The property is approximately one-half mile south of the intersection of I-95 and Route 152 and approximately one-third of a mile north of Route 40. Before a determination can be made as to whether the character of the neighborhood changed, the area constituting the neighborhood must be specifically delineated. Therefore, the primary issue controlling the resolution of the proposed zoning reclassification is what area reasonably constitutes the "neighborhood."

The processes of defining what borders constitute a neighborhood for a subject property is a difficult process and depends on the facts and circumstances of each case. See Sedney v.

Lloyd, 44 Md. App. 633, 639, 410 A.2d 616 (1980). The area constituting the neighborhood is extremely important because an examination of whether there was a substantial change in the character of the neighborhood is predicated upon a finding of what area constitutes the neighborhood. A "neighborhood," for purposes of zoning reclassification, must be the immediate neighborhood of the subject property, not some area miles away. See Woodlawn Area Citizens' Assoc. v. Board of County Commissioners of Prince George's County, 241 Md. 187, 216 A.2d 149 (1966). The Court is obligated to give the Board's judgment great deference regarding its definition of the neighborhood. However, the legal requirement still remains that the neighborhood delineated by the Board must be reasonable. See Sedney, 44 Md. App. at 640.

A review of the Hearing Examiner's transcript persuades this Court that the Board's definition of the neighborhood was unreasonable. The Petitioner described the neighborhood as consisting of Route 7 (extending to I-95), Route 40, Mountain Road and Clayton Road. See Hearing Examiner Transcript p. 26. The Petitioner's expert in the field of land use planning, Denis Canavan, described the neighborhood as I-95 to the north, Route 40 to the south, Old Mountain Road to the west and Winters Run to the east. See Hearing Examiner Transcript p. 49. Anthony McClune, an expert opposed to the rezoning, described the neighborhood as I-95 to the north, Clayton Road to the east, Route 40 to the south and Old Mountain Road to the west. It is clear that all three opinions as to the boundaries of the neighborhood are essentially the same. It should be emphasized that Mr. McClune opposed the zoning reclassification but still defined the neighborhood similar to that of the Petitioner and the Petitioner's expert. It should also be noted that he is a professional employee of the County Department of Planning and Zoning and completed the "Staff Report."

The Hearing Examiner, however, ignored this evidence and created his own definition of the boundaries of the neighborhood. The Hearing Examiner described the neighborhood reasonably within the immediate vicinity of the subject property as bordering Route 7 to the north, Route 152 to the east, the CSX rail to the south and Paul's Lane to the west. It is clear

that the Petitioner and the two expert witnesses defined the neighborhood as more expansive than did the Hearing Examiner. There was also evidence that on seven previous requests for zoning reclassification in the neighborhood, the Board adopted the same more expansive neighborhood boundaries as the Petitioner and the two expert witnesses. The Hearing Examiner stated that he based his determination of the neighborhood on the maps and testimony of the witnesses. The Hearing Examiner also stated that the Petitioner's definition of the neighborhood "is a large area and extends the 'neighborhood' well beyond the confines of the small residential neighborhood in which the subject property is situated." Quoting Hearing Examiner's Decision p. 9. It is this Court's opinion that the Hearing Examiner's definition of the neighborhood boundaries is inconsistent with the evidence presented.

The only evidence presented by the Respondent that was remotely consistent with the Hearing Examiner's definition of the neighborhood was that of Judith Rose. She is a neighbor of the Petitioner who stated that the neighborhood is Old Mountain Road to the south and Route 7 down to the access road between Old Mountain Road and New Mountain Road. It is wholly unreasonable for the Hearing Examiner to base his finding of what area constitutes the neighborhood on this description as it does not even define a western or eastern boundary for the neighborhood.

The Hearing Examiner's factual findings as to the boundary of the neighborhood were not supported by substantial evidence. The Petitioner, his expert witness and an expert opposed to the rezoning all described a more expansive definition of the neighborhood than that of the Hearing Examiner. A reasonable mind would not accept the testimony of the witnesses as adequate to support the Hearing Examiner's finding of the appropriate boundaries of the neighborhood. It is this Court's opinion that the substantial evidence presented supported a factual finding that the neighborhood boundaries consisted of I-95 to the north, Route 40 to the south, Old Mountain Road to the west and Winters Run to the east. Three witnesses testified to similar boundaries for the neighborhood and only one witness testified to a smaller neighborhood area.

Within reason, the public has the right to expect administrative agencies to apply some degree of consistency in decision-making. The definition of the "neighborhood" as being the same in seven prior cases was pointed out to the Hearing Examiner who ignored it.

b. Whether changes in the neighborhood changed the character of the neighborhood.

The Hearing Examiner concedes that "there have been numerous changes in this neighborhood over the years." Quoting Hearing Examiner's Decision p. 9. The Hearing Examiner pointed to six changes that have occurred in the neighborhood but concluded that "this neighborhood looks essentially as it did in 1989 and has not materially changed in character." Quoting Hearing Examiner's Decision p. 9. It is this Court's opinion that the Hearing Examiner erred in that his determination that the character of the neighborhood had not changed was not supported by substantial evidence.

The evidence presented as to the change in character of the neighborhood was substantial. The Hearing Examiner himself identified at least six changes to the character of the neighborhood since the Comprehensive Rezoning of 1989:

1. the widening of Route 152 from Route 40 to I-95;
2. an increase in vehicular traffic and the accompanying noise level;
3. an increase in traffic along the CSX rail lines;
4. construction of overhead transmission lines by BG&E with associated defoliation and removal of tree buffer;
5. six previous zoning reclassifications to B-3 in the neighborhood; and
6. the addition of a High's store in the neighborhood.

See Hearing Examiner's Decision p. 9. However, the Hearing Examiner determined that these changes did not materially change the character of the neighborhood. In fact, the Hearing examiner failed to identify several more changes in the neighborhood that were testified to by witnesses. There was testimony that a new gas station was constructed along with the High's store and that there was increased activity at a nearby concrete plant. There was also testimony that there was increased traffic on a communications tower located on the B&O Railroad property. Finally, there was evidence that the property partially abutting the Petitioner's was rezoned to B3 and approved for a used car lot.

None of the aforementioned changes standing alone would be sufficient to justify a

finding that there was a change in the character of the neighborhood. However, the evidence presented as to the changes in the neighborhood must be examined *in toto* to determine whether they changed the character of the neighborhood. It is the opinion of this Court that there was not substantial evidence to support the Hearing Examiner's decision that the character of the neighborhood did not change. Specifically, the previous zoning reclassifications indicate that the Board was convinced on at least six previous occasions that the character of the very same neighborhood changed. Moreover, Mr. McClune acknowledged the changes in the neighborhood as described. It should also be noted that Mr. McClune did not disagree that the property might warrant a different classification. He advocated that it be kept R1 until the County could determine what it should be. He even suggested a zoning reclassification that was non-existent.

The Hearing Examiner correctly pointed out that rezoning undeveloped property standing alone does not constitute a change in the character of the neighborhood. See Hearing Examiner's Decision p. 9. Moreover, this Court recognizes that Maryland case law supports the proposition that mere rezoning that is essentially a "paper change" does not suffice to effect a change in the character of the neighborhood. See Buckel v. Board of County Commissioners of Frederick County, 80 Md. App. 305, 315, 562 A.2d 1297 (1989) citing Miller v. Abrahams, 257 Md. 126, 130-31, 262 A.2d 524 (1970). After consideration of the previous zoning reclassifications and the aforementioned changes, however, this Court is convinced that there were in fact substantial changes to the character of the neighborhood since the Comprehensive Rezoning of 1989. It is apparent that the use of the properties in the neighborhood has evolved as the character of the neighborhood has changed. Even neighbors opposed conceded the changes. For the foregoing reasons, it is the opinion of this Court that the Hearing Examiner's determination that the Petitioner failed to meet his burden in establishing a change in the character of the neighborhood was not supported by substantial evidence.

CONCLUSION

The undisputed evidence from the expert witnesses and the Petitioner was that the neighborhood boundaries were more expansive than that delineated by the Hearing Examiner. There was no evidence to support the Hearing Examiner's conclusion other than the view of one neighbor. The evidence did support the Petitioner's argument that there had been a change in the character of the neighborhood since the last comprehensive rezoning. It is the opinion of this Court that the Board acted arbitrarily and capriciously in adopting the findings of the Hearing Examiner because the Hearing Examiner's factual findings were not supported by substantial evidence. A reasonable mind, presented with the same evidence as the Hearing Examiner, could not have reached the same conclusion as the Hearing Examiner. Because the Board's decision was not fairly debatable, the decision of the Board to deny the Petitioner's zoning reclassification from R1 to B3 will be reversed.

ORDER

It is hereby **ORDERED** this 8 day of May, 2000, that the decision of the Board of Zoning Appeals for Harford County is hereby **REVERSED** and **REMANDED** with directions to grant the rezoning request.



EMORY A. PLITT, JR.

Judge

cc: Robert S. Lynch
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